Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2009

MICHAEL D. GOODSON,
Petitioner,

v.

THE UNITED STATES,
Respondent,

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does a district court plainly err by removing a defendant's counsel of choice based upon the mere accusation that counsel had committed minor ethical lapses and where no hearing adjudicating such accusations ever took place?

(2) Does a court of appeals abuse its discretion by failing to allow a defendant to file a *pro se* brief when his court appointed attorney refuses to raise meritorious grounds of error the defendant specifically asks him to present?

LIST OF ALL PARTIES

Pursuant to SUP. CT. R. 14.1(b), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

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Hon. Lynn N. Hughes - District judge

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The opinion of the Fifth Circuit Court of Appeals is not reported. It is included in the appendix to this writ.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 22, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution reads in pertinent part:

> "[no] person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

UNITED STATES CONSTITUTION, Amendment V.

The Sixth Amendment to the United States Constitution reads in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have

the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, Amendment VI.

STATEMENT OF THE CASE

On March 31, 2006 Petitioner Michael D. Goodson was arrested and charged with the offense of conspiracy to defraud the United States. (Exhibit 2 at entry no. 10). The United States District Court for the Southern District of Texas had original jurisdiction in this case pursuant to 18 U.S.C. §3231. On the same day, Petitioner Goodson made his first court appearance before the magistrate judge. (Exhibit 2 at entry no. 11). Petitioner Goodson appeared without counsel. The federal public defender initially represented Petitioner. (Exhibit 2 at entry no. 15). Soon thereafter, on April 6, 2007, Petitioner appeared in court with retained counsel Abraham M. Fisch. (Exhibit 2 at entry no. 18). On April 19, 2006 the Honorable Lynn N. Hughes entered an order removing Attorney Fisch as counsel for Petitioner. (Exhibit 2 at entry 24). Attorney Fisch had yet to appear before the Respondent on Petitioner's case. (Exhibit 2 at entry nos. 10-24). The Respondent terminated Attorney Fisch's representation, "for the reasons stated on the record in Criminal Case H-01-443." (Exhibit 2 at entry 24).[1]

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[1] Attorney Abraham Fisch represented a client named Benjamin W. Bergh in an unrelated criminal action before Judge Hughes in 2002. Upon conclusion of the case, Judge Hughes *sua sponte*

The district court issued its order *sua sponte*, as the Government made no motion to disqualify Attorney Fisch. (Exhibit 3 at p. 47). Attorney Fisch filed a Motion to Quash and Dismiss the district court's order dated April 19, 2006. (Exhibit 2 at entry 34). The district court convened a hearing on April 25, 2006. (Exhibit 3). Petitioner Goodson was present. (Exhibit 3 at p. 29). In an acrimonious and hostile colloquy, the district court continually upbraided Attorney Fisch in the presence of Petitioner Goodson. Judge Hughes took umbrage at the fact that Petitioner had sworn he was indigent in a financial affidavit for appointment of counsel, and then retained Attorney Fisch a few days later. (Exhibit 3 at p. 3-4). Based upon his experience with Attorney Fisch some four years earlier, Judge Hughes also alleged that Attorney Fisch does not like to: (1) show up on time; (2) confer with his clients in advance; and (3) pick up pre-sentence reports from the probation

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ordered Attorney Fisch to return all the attorneys fees paid to him by the defendant Benjamin W. Bergh. (ORDER of June 12, 2002). Mr. Bergh had not requested the return of his attorney's fees and the Government had filed no motion for sanctions prior to Judge Hughes' order. Subsequently, Judge Hughes modified its order to reflect the actual amount of the fees paid. (ORDER of June 18, 2002). After Attorney Fisch filed his response to Judge Hughes' orders, Judge Hughes held a sanctions hearing on December 13, 2002. At the sanctions hearing, Judge Hughes rescinded his orders to refund the entire fees and, instead, ordered Attorney Fisch to pay one-thousand dollars [$1000.00] to the Texas State Bar Unauthorized Practice of Law Committee as sanctions.

department. (Exhibit 3 at p. 4, 12). Judge Hughes claimed that having Attorney Fisch on the case was, "an automatic habeas corpus." (Exhibit 3 at p. 27). Judge Hughes also claimed that Attorney Fisch was "unqualified" to be in the Judge Hughes's court (Exhibit 3 at p. 24) and accused Attorney Fisch of being a bad lawyer. (Exhibit 3 at p. 47). At one point Judge Hughes referred to Attorney Fisch as a "Pettifogger".[2] (Exhibit 3 at p. 49). Undersigned counsel pointed out that Attorney Fisch has never been found to have rendered ineffective assistance of counsel. (Exhibit 3 at p. 33). Soon thereafter, Judge Hughes insulted Attorney Fisch's deceased mother and compared Attorney Fisch's logic to that of Charles Manson. (Exhibit 3 at p. 49). When Attorney Fisch objected to being compared to Charles Manson, Respondent threatened to put Attorney Fisch in jail. (Exhibit 3 at p. 45). Undersigned counsel objected on Sixth Amendment grounds to the district court's removal of Attorney Fisch as counsel for Petitioner. Undersigned counsel pointed out that Attorney Fisch was in possession of a letter of good standing from the Southern District. (Exhibit 3 at p. 48). Judge Hughes claimed the certificate of good standing was procured through "fraud".[3] (Exhibit 3

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[2] A "pettifogger" is a lawyer whose methods are petty, underhanded, or disreputable. The word is synonymous with "shyster".

[3] Only by resorting to truly tortured logic could one say that Attorney Fisch had committed an ethical act worthy of disbarment on this ground. Assuming *arguendo* that Attorney Fisch did not disclose having received two public reprimands (by definition public records) when he reapplied in 1996 to the local admissions committee, Judge Hughes seems to

at p. 48). At the conclusion of the hearing, Judge Hughes indicated his intent to send a letter around to the other judges notifying them that Attorney Fisch was no longer in good standing. (Exhibit 3 at p. 52).

Subsequently, the magistrate court then attempted to appoint an attorney as Petitioner's counsel. Petitioner Goodson refused the appointment and renewed his request to appear with Attorney Fisch. (Exhibit 2 at entry 65). Petitioner Goodson stated in his letter that, after careful consideration, he felt Attorney Fisch, "will do a good job."

On June 26, 2006 this Court decided the case of *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), confirming the Sixth Amendment right to counsel of one's choosing. Undersigned counsel had cited the district court to the *Gonzalez-Lopez* lower court decision in his Motion to Quash and Dismiss. Four days later, on June 30, 2006, Judge Hughes reversed himself and issued an "Order on Reconsideration" allowing attorney Abraham M. Fisch to represent Petitioner Goodson. (Exhibit 2 at docket entry 66). Some eight months passed with Attorney Fisch representing Petitioner until February 28, 2007, at which time a pre-trial conference was held in anticipation of a jury trial scheduled for March 6, 2007. At this pre-trial conference, Judge Hughes again ordered Attorney Fisch removed from the Petitioner's case. (Exhibit 2 at entry 173). Judge Hughes claimed Attorney

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suggest that Attorney Fisch is worthy of disbarment ten years later in 2006, though a public reprimand itself is a lesser sanction than disbarment, and is probably insufficient to prevent one from being admitted to the bar of the Southern District even when disclosed.

Fisch's application for renewal had been "denied" by the admissions committee and produced a document stating as such. In fact, the admissions committee had only made a recommendation that it be denied. (Exhibit 4). Attorney Fisch then appealed to the Chief Judge of the Southern District. (Exhibit 5). The Chief Judge has taken no action and no hearing has been set or afforded Attorney Fisch. Attorney Fisch has never been afforded a hearing on the merits before any district judge, laison judge, or the chief judge.

At a subsequent hearing, the district court explained its reasons for removing Attorney Fisch as follows:

> Mr. Fisch is not a member of the Court. He has not applied for admission pro hac vice. He probably would not be eligible, being a resident practitioner. His admission would be conditioned on his application for admission, which has just been denied. So, it's – it's a complicated problem.
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> . . . .
>
> Mr. Fickman, I don't know whether you know but I didn't think he should have been allowed to represent him, in the first place. And we went through that. And I just finally gave up until he got disbarred because, at the levels of performance I have seen, regularly, that essentially it would be building in an ineffective assistance of counsel claim no matter what happened. And there's

> more to the administration of justice than playing games like that, but I relented – and not because of the Supreme Court case, just because it became a mini trial in its own right and I decided it was less trouble to go ahead and do it with Fisch. But other things have caught up with him. So, he may not do it. He properly may not do it. So, you're it.

Petitioner Goodson then filed a mandamus in the Fifth Circuit, which was denied. See *In re Goodson*, No. 07-20497 (5th Cir. 2007)(original proceeding). Petitioner Goodson refused all attempts to appoint him counsel in the district court and proceeded to trial *pro se*. Petitioner Goodson was convicted on all eight counts (four were severed out) and received a sentence of two-hundred-forty [240] months incarceration. (Exhibit 2 at entry 285). Goodson appealed and was assigned court-appointed counsel. Petitioner Goodson notified his court-appointed counsel of his desire to present his *Gonzalez-Lopez* claims on appeal.[4] (Exhibit 6). When his court-appointed counsel refused to do so, Petitioner filed a motion in the Fith Circuit to dismiss his court-appointed counsel and to proceed *pro se*. (Exhibit 6). The Fifth Circuit overruled the motion. (Exhibit 8). Petitioner filed a *pro se* brief

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[4] Petitioner's court-appointed counsel was also notified of the *Gonzalez-Lopez* issues by Attorney Fisch and notified of the existence of the mandamus raising those claims by the undersigned counsel.

anyway raising the *Gonzalez-Lopez* claims. The Fifth Circuit Court of Appeals *affirmed* Petitioner's appeal on December 22, 2009 without considering Petitioner's *pro se* brief. (Exhibit 1). This Petition for Writ of Certiorari is timely filed within 90 days of the entry of the judgment. *See* SUP. CT. R. 13.1.

SUMMARY OF THE ARGUMENT

The district court plainly erred[5] by removing Petitioner's counsel of choice based upon whimsical accusations of attorney misconduct. Petitioner's counsel was never afforded a hearing on the accusations and Petitioner's counsel was allowed to practice in other courts in the same district subsequent to his removal from Petitioner's case. The district court's removal of Attorney Fisch denied Petitioner his Sixth Amendment right to counsel of choice under *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

The Fifth Circuit Court of Appeals abused its discretion[6] by overruling Petitioner's motion to proceed *pro se*. Petitioner specifically directed his

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[5] This Court may review plain error even though not presented to the court of appeals. *Silber v. United States*, 370 U.S.717 (1962). Petitioner would not need to invoke this Court's authority to review plain error had he been allowed to proceed *pro se* on appeal.

[6] Whether to allow a pro se defendant to participate in the appellate process is reviewed for an abuse of discretion. *Cf. Price v. Johnston*, 334 U.S. 266, 184 (1948).

court-appointed counsel to raise his *Gonzalez-Lopez* claims. When his court-appointed attorney failed to do so, Petitioner moved to dismiss court-appointed counsel and proceed *pro se*. Petitioner made the court of appeals aware of his *Gonzalez-Lopez* issues and sought *pro se* status at the earliest practical opportunity. Nevertheless, the Fifth Circuit overruled his motion. This denied Petitioner due process of law. Petitioner did not have an adequate opportunity to present his claims in the context of the appellate process.

ARGUMENT

(1) Application of law to the facts.

A. Petitioner had a right to counsel of his choosing.

One of the rights we enjoy as citizens in a democratic society is the privilege of seeking the advice of counsel. In *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932), this Court held the right to be heard carries with it the constitutional baggage of being heard by counsel. The right to counsel secured under the Sixth Amendment includes the right to counsel of choice as one element of this basic guarantee. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006); See *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Powell v. Alabama*, 287 U.S. 45 (1932). The Sixth Amendment right to counsel of choice commands, not that a trial be fair, but that a

particular guarantee of fairness be provided - to wit, that the accused be defended by the counsel he believes to be best. *United States v. Gonzales-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006); see *Faretta v. California*, 422 U.S. 806, 819 (1975)("The Sixth Amendment . . . grants to the accused personally the right to make his defense . . . . for it is he who suffers the consequences if the defense fails."). The constitutionally-guaranteed right to counsel has been described as, "a right of the highest order." *United States v. Proctor*, 166 F.3d 396, 402 (1st Cir. 1999); see *United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906, 103 S. Ct. 208 (1982)("The interest in permitting a criminal defendant to retain counsel of his choice is strong, and deserves great respect.").

In *United States v. Mendoza-Salgado*, the Tenth Circuit found that, "Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Mendoza-Salgado*, 964 F.2d 993, 1015 (10th Cir. 1992); *accord United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979). Where a defendant is able to privately retain counsel, "the choice of counsel rests in his hands, not in the hands of the state." *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 2022 (1991).

Like the denial of the right to self-representation and the denial of the right to counsel, the denial of the right to be represented by one's selected attorney "infects the entire trial process" from "beginning to end." *United States v. Gonzales-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006). The erroneous deprivation of the right to counsel of choice qualifies as structural error,

is not subject to harmless-error analysis, and entitles a defendant to automatic reversal on appeal. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Harm is presumed because it "casts such doubt on the fairness of the trial process, that it can never be considered harmless error." *Penson v. Ohio*, 488 U.S. 75, 88 (1988)(citing *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988).

B. A district court does not have inherent power to remove a defendant's chosen counsel.

A presumption exists that a defendant is entitled to counsel of his choice. *Wheat v. United States*, 486 U.S. 153, 164 (1988). As a general rule, "defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." *United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir. 1985). Courts may deprive defendants of their preferred counsel, "only where such drastic action is necessary to further some overriding social or ethical interest." *United States v. Collins*, 920 F.2d 619, 626 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 2022 (1991).

Absent certain exceptions that are inapplicable to this case, a trial judge does not have the inherent power to remove defense counsel. *Harling v. United States*, 387 A.2d 1101, 1104-1105 (D.C. Cir. 1978). The logic behind such an absence of authority is well reasoned. Such inherent power would lead to an arbitrary misuse of authority and compromise the adversary process. Quoting from an opinion by the California Supreme Court:

> If the advocate must labor under threat that, at any moment, if his argument or advocacy should incur the displeasure or lack of immediate comprehension by the trial judge, he may be summarily relieved as counsel on a subjective charge of incompetency by the very trial judge he is attempting to convince, his advocacy must of necessity be most guarded and lose much of its force and effect.

Smith v. Superior Court of Los Angeles County, P.2d 65, 74; 68 Cal. Rptr. 1, 10 (Cal. 1968).

A district court does not have the inherent power to remove trial counsel simply because in his subjective opinion counsel is incompetent. According to *United States v. Kitchin*:

> **[A]cts which appear to violate the ABA Code or other accepted standards of legal ethics do not confer upon the trial court unfettered discretion to disqualify the attorney selected by a party.** An attorney may be disqualified only when there is 'a reasonable possibility that some specifically identifiable impropriety' actually occurred and, in light of the interests underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice.

United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979) citing *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976)(emphasis added).

The Fifth Circuit has adopted the Eleventh Circuit's analysis in *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553 (11th Cir. 1997) when considering the revocation of an attorney admitted *pro hac vice*. *United States v. Nolen*, 472 F.3d 362 (5th Cir. 2006). Although the *Nolen* and *Schlumberger Techs.* cases involved *pro hac vice* questions, the analysis should be instructive in the present case. In *Schlumberger Techs.*, the Eleventh Circuit noted that cases involving revocation of *pro hac vice* status generally fall into one of two categories: (1) those involving attorney conduct that challenges the court's authority or threatens disruption of court proceedings, and (2) those involving allegedly unethical attorney conduct that does not threaten the orderly administration of justice. *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553, 1559 (11th Cir. 1997). According to *Schlumberger Techs.*, in the second class of revocation cases, "**the court may not simply rely on a general inherent power to admit and suspend attorneys**," but "**must clearly identify a specific Rule of Professional Conduct which [sic] is applicable to the relevant jurisdiction and must conclude that the attorney violated that rule.**" *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553, 1561 (11th Cir. 1997)(emphasis added).

In *In re Evans*, 524 F.2d 1004 (5th Cir. 1975), the Fifth Circuit set forth both the procedural and substantive requirements that must be undertaken before denying an attorney the ability to

practice in the district court. Although *In re Evans* also arose in the context of a motion to appear *pro hac vice*, the procedural protections afforded local counsel should be at least as great, if not greater, than those granted to a lawyer from another state. According to *In re Evans*, if the district court has evidence of behavior that it believes justifies a denial of admission *pro hac vice*, the court must provide the attorney with adequate notice of all alleged misbehavior or unethical behavior that will be charged against him and the court must set a hearing on the issue. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. *In re Evans*, 524 F.2d 1004, 1008 (5th Cir. 1975). According to *In re Evans*:

> **Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of the District Court.** A member in good standing of a state bar may not be denied the privilege to appear except on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court.

In re Evans, 524 F.2d 1004, 1007-8 (5th Cir. 1975); see also *United States v. Nolen*, 472 F.3d 362 (5th Cir. 2006); *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553, 1159 (11th Cir. 1997)(emphasis added).

In re Evans, *Nolen*, and *Schlumberger Techs.* make clear that the alleged improprieties leveled against the lawyer must be of such a degree that they would justify disbarment of the lawyer admitted generally to the bar of the court. Petitioner submits that the past behavior of his attorney falls fall short of this standard. Attorney Fisch's alleged acts of misconduct indisputably belong in the second *Schlumberger Techs.* category. Attorney Fisch did not challenge the court's authority or threaten disruption of court proceedings. Attorney Fisch, as of the writing of this writ of certiorari, is a member of the State Bar of Texas, is licensed, and is in good standing. Currently, there are no other disciplinary proceedings pending against him.

The district court's complaints appear to involve what might fairly be described as general "unlawyerlike conduct"; a standard that has been held by the Fifth Circuit to be too broad and, therefore, susceptible to abuse. *In re Evans*, 524 F.2d 1004, 1008, n. 1 (5th Cir. 1975). Before being removed as Petitioner's chosen counsel the first time, attorney Fisch was not cited for contempt, reprimanded, fined, or otherwise disciplined for any action he took in representing Petitioner Goodson. All of the alleged misdeeds of Attorney Fisch dredged up by the district court concerned acts occurring in attorney Fisch's previous cases from years earlier. The worst misdeed occurring in the presence of the district court in 2002 was Attorney Fisch's failure to

pick up a pre-sentence report and failure to appear in court during a time when Attorney Fisch claimed he was ill. At no time did the district court allege any ethical violation that would likely result in Attorney Fisch's disbarment by the State Bar of Texas. If the district court truly believed that Attorney Fisch had committed some error worthy of disbarment, the district court should have initiated a complaint with the Chief Judge of the Southern District or with the State Bar of Texas years earlier. See *Thornton v. General Motors Corp.*, 136 F.3d 450, 454 (5th Cir. 1998)("where sanctions are imposed under Rule 11(c)(1)(B) by a district court on its own initiative, neither the award of attorney's fees **nor the suspension from practice before the court constitute a valid sanction** . . . . when a district court finds that a disciplinary sanction more severe than admonition, reprimand, or censure under Rule 11 is warranted, **it should refer the matter to the appropriate disciplinary authorities.**") (emphasis added).

Likewise, Attorney Fisch was not cited for contempt, reprimanded, fined, sanctioned, or otherwise disciplined before being removed as Petitioner's counsel the second time. The only noteworthy occurrence was a mere recommendation made by a secret committee[7] that Attorney Fisch's application for re-admission should not be renewed. (Exhibit 3).

The district court wholly failed to consider the Petitioner's Sixth Amendment rights before twice

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[7] Despite asking for the members' names, Attorney Fisch has been told that the members of the admission committee serve in secret.

removing his counsel of choice.[8] See *United States v. Nolen*, 472 F.3d 362 (5th Cir. 2006). The district judge was not in a position to make qualitative decisions regarding Attorney Fisch as a lawyer, where the allegations did not arise to the level of disbarment. See *In re Evans*, 524 F.2d 1004, 1007-8 (5th Cir. 1975). Regardless of the merits of the complaints leveled at Attorney Fisch by the district court, the district court should have allowed him to remain as Petitioner's chosen counsel until a hearing was conducted and a final ruling issued. Until and unless there is a final order of disbarment, Attorney Fisch remains eligible to practice in the district court. According to the local rules of the Southern District of Texas, Attorney Fisch was entitled to certain due process procedures before being denied the ability to practice. Rules 4(B), 5(A)-(G) Rules of Discipline United States District Court Southern Dist. Of Texas (2000). (Exhibit 7). *Cf. Gathe v. Housing Authority of Lafayette*, 2006 U.S. Dist. Lexis 91114 (U.S. Dist. Ct. Western Dist. Louisiana 2006).

In *Gathe*, an attorney from Illinois filed a motion to appear *pro hac vice* along with a notice that she was subject to a current disciplinary proceeding in her home state. The district court, citing the Fifth Circuit's opnion in *In re Evans*, found that, inasmuch as the disciplinary proceedings in Illinois were ongoing, the court was, "not in the position to determine" whether the attorney's conduct "rises to the level of disbarment". *Gathe*, *supra*. The district

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[8] The district court boldly stated its disagreement with *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), arguing that the dissent, rather than the majority, was the correct opinion.

court then continued the case until the Illinois proceedings were concluded. *Gathe, supra.*

The district court also failed to consider lesser sanctions other than removal of Attorney Fisch as Petitioner's counsel. In order to assuage the district court's concerns and in order to assure Attorney Fisch's future compliance with local rules, undersigned counsel suggested that district court take some other, less drastic, action than removing Petitioner's counsel of choice. The district court could have imposed lesser sanctions such as a bond, an order, or a threatened contempt in order to secure Attorney Fisch's future compliance with local rules. The district court refused to do so. In this respect, the court ran afoul of previous case law from the Fifth Circuit. Where there is a reasonable possibility that some impropriety might occur in the future, other, less harsh, sanctions are more appropriate than disqualification of a defendant's chosen counsel. See *United States v. Snyder*, 707 F.2d 139, n. 4. (5th Cir. 1983) citing *Norton v. Tallahassee Memorial Hospital*, 689 F.2d 938, 941, n. 4 (11th Cir.1982). Disqualification of an attorney should only be a measure of last resort. *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986).

The district court's order disqualifying Petitioner's counsel is particularly erroneous given the fact that it was possible to try the Petitioner's case with his chosen counsel well before any disciplinary hearing was even convened. Petitioner was set for trial with Attorney Fisch on March 6, 2007. (Exhibit 1 at docket entry no. 159). As of the writing of this writ of certiorari, Attorney Fisch has yet to be afforded a hearing on the district court's allegations. At a minimum, the district court should have granted Petitioner his requested continuance as

the district court did in *Gathe* until such time as the allegations of misconduct were heard and resolved.

Moreover, Petitioner's counsel was allowed to practice in other courts in the same district subsequent to his removal from Petitioner's case. (Exhibit 7 - attached affidavit of Attorney Fisch).

Thus, the district court exceeded its jurisdiction and plainly erred by arbitrarily removing Petitioner Goodson's attorney of choice.

(C) The Court of Appeals erred by not allowing Petitioner to raise his *Gonzalez-Lopez* claims where his court-appointed attorney refused to do so.

The Fifth Circuit Court of Appeals abused its discretion by overruling Petitioner's motion to proceed *pro se*. Petitioner specifically directed his court-appointed counsel to raise his *Gonzalez-Lopez* claims. (Exhibit 6). When his court-appointed attorney failed to do so, Petitioner moved to dismiss court-appointed counsel and proceed *pro se*. (Exhibit 6). Petitioner made the court of appeals aware of his *Gonzalez-Lopez* issues and sought *pro se* status at the earliest practical opportunity. (Exhibit 6). Petitioner filed his motion to proceed *pro se* months before the case was submitted. This was a sufficiently clear, unequivocal, and timely request to have his claims heard. See *Faretta v. California*, 422 U.S. 806, 807 (1975)(The Court in *Faretta* noted that the defendant requested to represent himself "[w]ell before the date

of trial" and "weeks before trial." making a clear and unequivocal statement to represent himself.).

The Fifth Circuit overruled Petitioner's motion on October 28, 2009. (Exhibit 8). Petitioner then filed a *pro se* brief anyway, which raised his *Gonzalez-Lopez* claims in addition to those points raised by his court-appointed attorney. The Fifth Circuit Court of Appeals *affirmed* Petitioner's appeal on December 22, 2009 without considering Petitioner's *pro se* brief.

The procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Evitts v. Lucy*, 469 U.S. 387 (1985). The right to counsel on a direct criminal appeal is a due process right. Cf. *Miller v. Keeney*, 882 F.2d 1428, 1431 n.4 (9th Cir. 1989). An indigent defendant is entitled to the appointment of counsel to assist him on his first appeal. *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967).

The law does not require appointed counsel to raise every available non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745 (1983). The law should require, however, that a court-appointed attorney raise those issues that the appellant himself believes are the most likely to result in relief being granted. A lawyer should acquisce in the client's choice of which non-frivolous issues to pursue. *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (BLACKMUN, J., concurring). It is the defendant that should have the right to decide which non-frivolous issues should be presented on appeal. *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (BRENNAN, J., dissenting).

This is not a case of an unsophisticated defendant asking his court-appointed counsel to advance dubious claims on appeal. Rather,

Petitioner was simply asking his court-appointed attorney to advance those arguments he previously brought forth to the same court of appeals in a writ of mandamus.

In the present case, the *Gonzalez-Lopez* arguments that Petitioner attempted to advance were clearly stronger than those issues that court-appointed counsel ultimately presented to the court of appeals. Court appointed-counsel simply ignored the requests of the Petitioner. Under *Jones v. Barnes* Petitioner could not force his court-appointed counsel to raise the *Gonzalez-Lopez* arguments. His only option, therefore, was to proceed *pro se*.

The court of appeals should have allowed Petitioner to do so. Petitioner made his request early enough not to be a hindrance to the appeal. He also identified his points of error and explained that the reason he wished to proceed *pro se* was because his court-appointed counsel failed to raise the issue. (Exhibits 6, 7). By failing to allow Petitioner to proceed *pro se*, the circuit court effectively deprived Petitioner of a meaningful appeal. It is the Petitioner who must bear the consequences of any affirmance and it is only just that his choice of which points of error to pursue be honored. Respect for the individual is the lifeblood of the law. See *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (BRENNAN, J., concurring). To force a lawyer's decisions on a defendant "can only lead him to believe that the law contrives against him." See *Faretta*, 422 U.S. at 834.

(2) Reasons for granting the writ.

The Fifth Circuit Court of Appeals has entered a decision in conflict with the decisions of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; has decided an important question of federal law that has not been, but should be, settled by this Court; and has decided an important federal question in a way that conflicts with relevant decisions of this Court

The district court's actions in twice removing Petitioner's counsel constitute a judicial usurpation of power. A district court should not be free to play ping-pong with the Sixth Amendment. It is the Petitioner Goodson who will, "bear the personal consequences of a conviction" and not the district judge. See *United States v. Davis*, 285 F.3d 378, 384 (5th Cir. 2002) *cert. denied*, *White v. United States*, 537 U.S. 1066, 123 S. Ct. 618 (2002). Petitioner Goodson has, "a right to preserve actual control over his defense." *Id.*

The actions of the district court render the right to counsel meaningless and wholly eviscerates this Court's decision in *Gonzalez-Lopez*. The case at bar has a bearing on every criminal case filed in the country. Now it appears that all a district judge need do to avoid having a difficult or unpleasant lawyer appear before it is to make a general accusation of attorney misconduct. This Court should take the opportunity to reaffirm the principles espoused in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)

and strongly reject the district court's actions in this case.

After his conviction, Petitioner notified the court of his desire to appeal. Petitioner's appeal, like most appeals in the federal system, was prosecuted by a court-appointed lawyer. This case, therefore, has far reaching consequences for the public and for the sytem of appointing lawyers. At a time when the public's confidence in court-appointed lawyers is at an all time low, this Court should take the opportunity to reaffirm the rights of the individual defendant, wealthy or poor, when it comes to managing the defense of a criminal case in which the defendant alone will suffer the consequences of any adverse ruling.

CONCLUSION

The district court plainly erred by denying Petitioner his counsel of choice. The Fifth Circuit Court of Appeals abused its discretion by refusing to allow Petitioner to present his *Gonzalez-Lopez* claims *pro se*. Based on the foregoing, Petitioner prays that this Petition for Writ of Certiorari be granted. The Court may wish to consider summary reversal of the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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